Supreme Court, U.S.
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In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUMMARY OF ARGUMENT

On March 22, this Court decided *Board of Regents v. Southworth*, No. 98-1189. Plaintiffs file this Supplemental Brief to review *Southworth*'s implications for this case.

Southworth rejects two central pillars of Santa Fe's argument – its claim that student referenda are a neutral means of selecting speakers, and its claim that on a facial challenge the Court must assume everything in favor of the government, no matter how unrealistic. *Southworth* also clarifies the relationship between government speech on the one hand, and private speech supported or subsidized by government on the other.

If the student elected to give the invocation or message is a government speaker, as plaintiffs have argued, then all sides agree that she cannot lead the crowd in prayer. If she is a wholly private speaker, as Santa Fe claims, then she must be selected in a viewpoint-neutral manner, because the school gives her substantial assistance in delivering her message to a state-assembled audience. But *Southworth* holds that a student election to decide who gets to speak is not a viewpoint-neutral selection process. Either way – as a government speaker or as a private speaker with exclusive access to the public address system – it is unconstitutional for an elected speaker to lead the crowd in prayer.

Southworth rejected the student referendum on a facial challenge. The Court did not assume that students would vote on speakers without regard to the speakers' viewpoint, and it did not hold that courts could review only the outcome of particular votes instead of reviewing the choice to commit constitutional rights to a student vote in the first place. Rather, the Court reviewed the referendum procedure on its face, and it assumed that a majority vote would reflect the majority's viewpoint – which is of course what referenda are designed to do.

ARGUMENT

I. *Southworth* Holds That a Student Referendum Is Not a Neutral Means of Selecting Speakers.

Santa Fe conducts student referenda first to decide whether to authorize a student to deliver an invocation or message in its pre-game ceremonies, and then to select the student to give the invocation or message. Plaintiffs have contended that these referenda do not privatize the resulting prayers, and that a referendum on whether to authorize prayer is itself an unconstitutional feature of Santa Fe's Football Policy. Resp. Br. 20-26.

Santa Fe contends that the football prayers are private student speech. It also contends, more by assumption than by argument, that the student referenda are a constitutionally neutral method of deciding whether to authorize prayer and of selecting the student speaker to deliver the invocation or message. Pet. Br. 18.

Southworth rejected Santa Fe's contention that a student referendum is a viewpoint-neutral method of selecting the student speaker. *Southworth* thus made clear that the football prayers are unconstitutional even if they are somehow characterized as private speech. For at the very least, the student speaker who delivers the prayers is given exclusive speaking privileges by the school, and a private speaker who gets these exclusive privileges must be selected in a viewpoint-neutral process. Santa Fe has not claimed otherwise; it contends that its process is neutral. But *Southworth* held that a student referendum is not neutral. A student referendum is designed to vindicate the view of the majority, while "the whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." Slip op. at 16.

We are not here concerned with election of public officials or student leaders to perform many diverse tasks over a period of time, only some of which involve speech. This case, like *Southworth*, involves referenda that directly

and primarily allocate a government-assisted opportunity to speak. The student referenda in *Southworth* were like the second of the two elections in each annual sequence in Santa Fe: Each is an election to choose speakers for special government benefits. Students in *Southworth* voted to fund some speakers and to defund other speakers; students in Santa Fe vote to give one speaker exclusive access to the stadium public address system for the purpose of giving an invocation or message, and vote to deny that access to all other speakers.

Because referenda allocating the right to speak are not viewpoint neutral, characterization of the football prayers as private speech would mean that they violate the Free Speech Clause as well as the Establishment Clause. Santa Fe's football prayers would violate the Free Speech Clause because they give exclusive speech rights to one student, and that student is selected by a process that is not viewpoint neutral. The football prayers would also violate the Establishment Clause, because it is settled that religious speech cannot be granted preferential access to public property. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

Santa Fe's defense – that no viewpoint is given preferential access because the student referendum is a neutral selection process – is precisely the defense that *Southworth* rejected:

> We do not sustain . . . the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle.

Id. at 2.

> The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

Id. at 11.

> To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as majority views.

Id. at 16.

Because the student referendum in this case is not a viewpoint-neutral process, it cannot justify Santa Fe's grant of exclusive speech rights to one student who leads a prayer in the school's pre-game ceremonies.

II. *Southworth* Clarifies That the Football Prayers Are Unconstitutional Whether Characterized as Governmental or Private.

In our principal brief, we argued that private prayer is constitutionally protected, that government prayer is constitutionally forbidden, and that many factors combine to make Santa Fe's football prayers governmental. Resp. Br. at 10-26. One of the factors that independently supported this conclusion was preferential access to the public address system. *Id.* at 39-41. Granting preferential access to public facilities is a form of government endorsement that violates the Establishment Clause; we still believe that is the simplest analysis of this case.

However, *Southworth* highlighted an alternative way to analyze such issues. *Southworth* recognized a category of government-assisted private speech, and it recognized constitutional rules for the award of such government assistance. If Santa Fe's football prayers are private but government assisted, they violate *Southworth*, because the government assistance is awarded on a basis that is not viewpoint neutral.

Southworth involved a university program to assist student speech with financial subsidies. The Court began with the distinction at issue here: the familiar distinction between government speech and private speech. Slip op.

at 9-10. The University insisted that the subsidized speech was private, not governmental. Like Santa Fe here, the University attributed the disputed speech to the students:

> The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

Id. at 10.

This characterization was credible, and apparently uncontested on the facts of *Southworth*, because the University subsidized a wide range of speakers on a viewpoint-neutral basis. *Id.* at 4-6. Accepting this characterization, the Court turned to the constitutional standard applicable to private speech subsidized by the University. *Southworth* held that if a university subsidizes private speech without making that speech its own, the subsidized private speakers must be selected in a manner that is viewpoint neutral:

> The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. . . . When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.

Id. at 14.

This case does not involve mandatory student fees, but rather preferential access to a speaking opportunity at an official school event. Instead of many speakers being awarded financial subsidies, one speaker is awarded exclusive access to the public address system at a crowded football stadium. The same principles apply to both cases. Access to public, limited, or even nonpublic

fora must be granted on a viewpoint-neutral basis,[1] and all the equal access cases have stated or implied that preferential access for religious speech violates the Establishment Clause.[2] Indeed, *Southworth* expressly derived its viewpoint-neutrality requirement for financial subsidies from the pre-existing viewpoint-neutrality requirement for access to public property. Slip op. at 10. "Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* at 16-17. Santa Fe does not dispute the requirement of viewpoint neutrality in granting speakers access to its property; its defense is that there is no preferential access, because the one specially privileged speaker is selected through a viewpoint-neutral process.

Even if Santa Fe's football prayers are private, they plainly get government assistance in the form of exclusive access to the public address system. If the prayers are private, they are, like the subsidized speech in *Southworth*, private speech with government assistance. And this assistance is awarded through a student referendum, which is not a viewpoint-neutral process.

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[1] *See, e.g., Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 834 (1995) ("the University may not discriminate based on the viewpoint of private persons whose speech it facilitates"); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993) ("control over access to a nonpublic forum" must be viewpoint neutral).

[2] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) ("preferential access . . . would violate the Establishment Clause (as well as the Free Speech Clause)) (plurality opinion); *Board of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (school that permits religious club to meet, "just as it permits any other student group to do, does not convey a message of state approval or endorsement") (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("forum is available to a broad class of nonreligious as well as religious speakers").

Santa Fe is thus left with two possibilities. If the prayers are governmental, all parties agree that they violate the Establishment Clause. If the prayers are private, they violate the Establishment Clause and the Free Speech Clause, because Santa Fe awards government assistance to religious speech through a student referendum, a process rejected in *Southworth*.

This analysis does not mean that there can never be a private speaker at an official school event, nor does it mean that there can never be an elected speaker at an official school event. It does mean that wholly private speakers cannot be elected for the sole purpose of speaking, and that speakers so elected cannot be wholly private. Private speakers given preferential access must be selected on viewpoint-neutral criteria, and winning an election is not such a criterion. It follows that an *elected* speaker with government support or preferential access must be treated as a state actor, or at least that her speech is subject to constitutional scrutiny because of the state action in directing the election and in granting special privileges to the winner. If a speaker wishes to remain a wholly private speaker with government assistance, *Southworth* says that she cannot be elected.

Elected speakers do not acquire free speech rights by virtue of their election, because a majority cannot award special free speech rights to selected speakers. The government may voluntarily accord broad discretion to such speakers, but it cannot authorize them to say things that the government could not constitutionally say itself.

Nor does this analysis mean that there can never be religious speech at a school event. But for such speech to be consistent with the neutrality requirements of the Free Speech and Establishment Clauses, it must be the

incidental result of a viewpoint-neutral process, such as a forum open to multiple speakers with a diverse array of views.[3]

III. *Southworth* Invalidated the Student Referenda on a Facial Challenge.

A centerpiece of Santa Fe's case is its claim that this is only a facial challenge, that the Court must therefore ignore everything that has actually happened in Santa Fe, and that it must indulge the most optimistic assumptions counsel can devise about what might happen in the future. *Southworth* implicitly rejects that argument.

Although the fact drew little comment in the opinion, *Southworth* was a facial challenge to the University's policy. The opinion upheld "the University's program in its basic structure." Slip op. at 15. The opinion describes no challenge to a particular vote or a particular funding decision; it describes a challenge to the program as a whole. This was a facial challenge, although that term was not used.

In the context of this facial challenge, the Court concluded that the referendum procedure was almost certainly invalid. The issue had to be remanded, because the record was so undeveloped that the Court appeared to be

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[3] In communities with a sufficiently large majority of a single religious faith (or a cluster of similar faiths), even a viewpoint-neutral selection system may result in religious domination of the government-assisted opportunity to speak. In such a case, the Court would have occasion to apply its earlier statements that religious domination of even a formally neutral forum can violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 275. This case is easier, because religious domination of the opportunity to speak at football games results from a non-neutral selection process, deliberately designed to yield the religious domination that has resulted.

somewhat uncertain whether a student organization could be funded or defunded by a student vote. *Id.* at 16. And the Court left open the possibility that the referendum process might be subordinated to some protection for viewpoint neutrality. *Id.* But there is not the slightest hint that the Court assumed that the students might vote on a viewpoint-neutral basis, or that the lower court on remand should review only the outcome of individual votes and not invalidate the referendum process on its face.

Unlike an administrative agency, which can be subjected to binding criteria and judicial review, voters have unbounded discretion. Unbounded discretion in awarding speech rights is always subject to facial challenge as an unconstitutional basis for selecting among private speakers. *See, e.g., City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750 (1988). *Southworth* assumes on a facial challenge that the majority will vote its own preferences.

Even before *Southworth*, Santa Fe had all but conceded that a student referendum on prayer at football games would be unconstitutional. Reply Br. at 8. It claims only that the students do not vote directly on whether to have prayer, and that they might elect a football speaker without regard to her views on prayer at football games. *Id.* at 8-9. Santa Fe asks the Court to assume that students might vote on popularity or other grounds unrelated to the issue of prayer at football games. *Southworth* implicitly rejects this implausible claim. *Southworth* assumes that student referenda will represent the view of the majority; that is what referenda are designed to do.[4]

Students may vote on grounds of popularity when electing a student council officer to a position with limited and diverse responsibilities after a campaign with few or no serious issues. Santa Fe invokes high school memories of such elections, Reply Br. at 8-9, but that

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[4] Santa Fe also fails to explain how popularity could be a viewpoint-neutral criterion. A student with unpopular views is unlikely to be popular.

memory is not this case. Santa Fe students elect a representative to perform a single task – to deliver the invocation or refuse to deliver the invocation – and they conduct these elections in the midst of a bitter and protracted public dispute over invocations. It is absurd to assume that students will ignore the one squarely presented issue and vote without regard to whether they want an invocation. The results of the several Santa Fe elections in the judicial record confirm that students persistently elect a speaker who will deliver an invocation. Resp. Br. 4-5, 23. With or without a record, *Southworth* holds that the risk of such voting behavior is too great to permit referenda to award special privileges to private speakers, and that such a process should be invalidated on a facial challenge.

CONCLUSION

Southworth is fully consistent with the argument in plaintiffs' principal brief, and it rejects essential premises of the argument in Santa Fe's briefs. For these additional reasons, as well as the related reasons stated in our principal brief, the portion of the judgment presented in the limited grant of *certiorari* should be affirmed.

Respectfully submitted,

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